This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 5/04/05.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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| IN THE MATTER OF: | ) | |
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| DAVY CADY, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| and | ) | CHARGE NO: 1997CF2178 |
| | ) | EEOC NO: 21B971591 |
| NORTHEASTERN ILLINOIS UNIVERSITY and CHICAGO BOARD OF EDUCATION - TAFT HIGH SCHOOL | ) | ALS NO: 10589 |
| Respondents. | ) | |

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RECOMMENDED ORDER AND DECISION

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This matter comes before me after a public hearing held in Chicago, Illinois on June 3 and 4, 2004. The parties filed closing briefs and other related pleadings up to December 6, 2004. Thus, the record is now closed and the case is ready for a decision.

**Contentions of the Parties**

Complainant submits that he was discriminated against on the basis of his race (white) when Respondent NEIU at the request of Respondent Taft High School (Taft) posted a notice for an available teaching position which required that candidates "need to be minority." Respondents deny that they discriminated against Complainant in that: 1) Complainant cannot establish he was qualified for the job or that he applied for the position; and 2) even if Complainant is qualified, the statement was mistakenly written on the posting by a secretary who misquoted the principal from Taft High School. Although at hearing, Respondent NEIU's position was not known since it did not put forth a defense.

## Findings of Fact

The following facts I found were proved by a preponderance of the evidence. Assertions made in the record which are not addressed in this decision were determined to be unproven or immaterial to this decision.

1. During all times pertinent to this complaint Northeastern Illinois University's (NEIU) career placement office took phone, mail or facsimile requests from employers seeking to have job openings posted in the office.

2. It was a job duty of a secretary or student worker in the NEIU placement office to accept phone intake requests from potential employers.

3. The procedure for doing so required the caller to identify the open position, the job requirements and a contact person with whom interested applicants could apply.

4. The NEIU career placement employee who received the call would fill out a job intake form, which would then be transferred to a typewritten list and posted on a bulletin board for job candidates to view.

5. The director of placement, Lorne Coleman, conducted occasional spot-checks of the typed lists but did not review hand-written job intake forms.

6. At all times pertinent to this complaint, Becky Kallem, a secretary in NEIU's career placement office, was authorized to take calls from employers and fill out intake forms with information she received from the call.

7. In September of 1996, Kallem took a call from the principal of Taft High School who was seeking applicants for a full-time "Introduction to Music" teacher.

8. At all times pertinent to this Complaint, the Chicago Board of Education, including Taft High School, was operating under the terms of a 1980 federal desegregation consent decree which required the school districts to maintain a certain percentage of minorities to students on its teaching staff. However, a school could request a deviation

from the percentage twice a year by submitting an applicant through the “Faculty Integration Exception Request Process.”

9. During the call Kallem filled in the pertinent information on the blanks of the form with information she received from the principal. The transcribed information identified the open position and stated that the applicant should be certified to teach in Illinois or “immediately certifiable." It also provided that interested applicants should phone the principal to apply.

10. During the phone conversation with the principal of Taft High School, Kallem was instructed that the applicant “must conform to board of education. Need to be minority.”

11. Kallem then wrote on the job posting, under the section titled “Description and Requirements,” the phrase “must conform to Bd. of Ed. Need to be minority.”

12. The job announcement was posted on the bulletin board for public view and on September 6, 1996, Complainant Davy Cady, who is Caucasian, saw the job posting in NEIU’s career placement office.

13. Complainant became upset after reading the language “need to be a minority” included on the job posting in NEIU’s career placement office and in fit of rage began throwing magazines on the floor.

14. Complainant held a valid teaching certificate on September 6, 1996, but was not endorsed to teach music and had no classroom experience teaching the subject.

15. Complainant met the minimum qualifications for the position as listed on the job posting since it only required a candidate to be certified to teach in Illinois.

16. Taft did not hire an outside candidate through NEIU’s placement office, but instead administratively transferred Aldona Nadzius from another school to fill the music teacher position in October of 1996.

16. Nadzius held a doctorate degree in education, had seven years of experience teaching music in K-12 classrooms and her teaching certificate contained a music endorsement.

## Conclusions of Law

1. The Illinois Human Rights Commission has jurisdiction over the parties and the subject matter in this case.

2. Complainant is an "aggrieved party" as defined within the meaning of section 1-103(B) of Illinois Human Rights Act. ***775 ILCS 5/1-103(B).***

3. Respondent is an "employer" within the meaning of section 2-101(B)(1)(a) of the Act and was subject to the provisions of the Act. ***775 ILCS 5/2-101(B)(1)(a).***

4. Complainant established direct evidence of race discrimination against Respondent Chicago Board of Education-Taft High School by showing that the school sought only minority applicants for an open teaching position in violation of section 2-102(a) of the Act. ***775 ILCS 5/2-102(A).***

5. Complainant established Respondent Northeastern Illinois University (NEIU) aided and abetted Respondent Chicago Board of Education-Taft High School in discriminating against him on the basis of his race when it posted a job announcement on its job board seeking only minority applicants for a job in violation of section 5/6-101(B) of the Act. ***775 ILCS 5/6-101(B).***

6. Complainant is not entitled to damages for back pay because he failed to establish that his qualifications were superior to the qualifications of the person hired to teach Introductory Music at Taft.

7. Complainant is entitled to $2000 in damages from both Respondents for the emotional distress caused by viewing the posting in the NEIU placement office in September 1996.

## Determination

Complainant proved by a preponderance of the evidence that he was discriminated against on the basis of his race when, at the request of Respondent Chicago Board of Education-Taft High School (Taft), Northeastern Illinois University (NEIU) posted a job opening seeking exclusively minority applicants for a teaching position at Taft High School. Complainant also proved by a preponderance of the evidence that Respondent NEIU aided and abetted Respondent Taft in race discrimination.

## Discussion

This case presents the issue of whether the language of a job announcement posted for public view in a career center can constitute race discrimination by an employer, and whether the center is an aider and abettor of discrimination. The Illinois Human Rights Act makes it unlawful "for any employer to refuse to hire …or to act with respect to recruitment …on the basis of unlawful discrimination. ***775 ILCS 5/2-102(A).*** However, in this case Complainant has proven through the use of direct evidence that Respondents have done just that which is prohibited by the Act.

Direct evidence of discrimination may be used in three ways: 1) to establish a *prima facie* case, which raises the inference of discrimination; 2) to establish pretext; or 3) to establish conclusively that discrimination occurred. ***Belha and Modform***, __ Ill. HRC. Rep.__, Charge No. 1987CF2953 (Order and Decision, January 31,1995), slip op at 7. While the latter is extremely rare, the evidence in this case appears to conclusively establish that the plain language in the job posting violates the Act. However, to accomplish this Complainant must show that a discriminatory reason more likely motivated Respondents in soliciting and hiring candidates for the position at Taft High School. ***Belha*** **at 8.** Once this is established, it is undisputed that the Act has been

violated and Respondents are liable. The only remaining issue will be one of damages. Liability as to each Respondent will be discussed below.

**Race Discrimination by Taft High School**

Establishing direct evidence to prove a *per se* violation of the Act is a difficult task for a complainant to accomplish because "it essentially requires an admission by the decision maker that his actions were based on the prohibited animus, and these admissions are rarely found." ***Haywood v. Lucent Tech. Inc.***, 169 F.Supp.2d 890, 907 (N.D. Illinois, 2001), citing ***Radue v. Kimberly-Clark Corp.***, 219 F.3d 612, 616 (7th Cir. 2000). While the smoking gun in this case is the existence of the language "must conform to Bd. of Ed. Need to be a minority" written on a job posting for public view in NEIU's career placement office, the requisite intent of the decision maker, i.e. the principal at Taft High School (Taft), is the stumbling block. Specifically, Respondent Taft argues that the requisite intent to discriminate was not present because a former NEIU placement office secretary, Becky Kallem, simply made a mistake in writing the words "need to be a minority" on the job intake form. The evidence reveals otherwise.

At hearing, Kallem testified that in September of 1996, she received a telephone call from the principal of Taft High School, who was seeking applications for a music teacher.[1] During the call she remembered writing on the job intake from the phrase "need to be a minority." However, she testified that while she believes she made a mistake in summarizing what the principal actually said during the call, she attributed her mistake to "hindsight" because of the fact that she was "in court." *Tr. p. 87.* In other words, her testimony can be construed to mean that the only mistake she made was actually writing what was told to her on the form. After laborious questioning from both parties, Kallem testified that she could not remember exactly what the principal told her,

[1] The principal was deceased at the time of the hearing so Kallem's testimony in conjunction with the job posting was tantamount to determining if the principal actually instructed Kallem to write the statement "need to be a minority" on the job intake form.

but she thought he "wanted to mention in a way that he wanted to encompass looking for minorities as teachers" or "wanted to open [the job] to minorities or something like that." *Tr. 71,75.*

Also, Kallem had no memory of writing the phrase "must conform to Bd. of Ed." on the intake form and did not know that the school was subject to a federal desegregation consent decree. Despite Kallem's misrecollection, it is still logical to conclude that she wrote the phrase on the form because it appears to be the same penmanship written contemporaneously with the wording "need to be a minority." Kallem's lack of certitude with regard to what the principal told her is understandable given the amount of time that has passed since the incident, but the fact that she was not aware of a federal consent decree under which the board operates lends credence to the idea that she indeed wrote on the form exactly what the principal told her during the conversation.

Considering the language "need to be minority" along with the phrase "must conform to Bd. of Ed.," the conundrum of the principal's intent of hiring a minority candidate is moved into a different light. Kallem simply would not have summarized the phrase "need to conform to Bd. of Ed." in her own words since she had no idea of the federal 1980 school desegregation consent decree. The decree required Taft, as well as all Chicago public schools, to maintain a "range of compliance" within a certain percentage of minority teachers to students depending on the current system-wide proportions in the district. (See paragraph 3.1 of Consent Decree, Bd Ex. F.) In fact, principals were specifically directed by the district to "recruit personnel to fill vacant positions to maintain or enhance the school's compliance with the desegregation plan." (Bd ex. G, Bates stamp 000142). While it is true that this percentage was mandatory, schools could deviate from the percentage upon a showing of need. To accomplish this, a school principal could seek a sort of variance from the decree's requirements by

submitting to the "Faculty Integration Exception Request Process" which included a three-phase process before an "HR Compliance Review Team." This process however does not appear to be a simple task and could only be sought two times a year. (Bd Ex. G).

Since the HR Committee only met twice weekly to review requests for the integration exception process, it is safe to assume that some additional time was added to the hiring process if a non-minority teacher was selected for hire. If the request was not approved, it is also safe to extrapolate from the evidence before me that the principal would have to spend additional time to hire an alternative candidate. This analysis is important because Taft's principal contacted NEIU to post its teacher position in early September, after the fall school semester had begun. Kallem testified it was her impression that the principal wanted the position filled right away because he would have been in a "predicament" by not having a teacher in the position by August. In other words, it is easy to deduce that Taft's principal's "predicament" of needing a teacher right away would not have given him the leisure of submitting an applicant to the Integration Exception Request Process. Therefore, the easiest way to remain in compliance with the desegregation order would be to hire a minority candidate. My review of the evidence presented during the hearing coupled with the testimony of NEIU placement employee, Becky Kallem, unequivocally establishes that the Taft High School principal instructed Kallem that the school wanted minority applicants for its open music teacher position and so she indicated that fact on the form reviewed by Complainant. Respondent Taft's intent is clear, direct evidence of race discrimination against Complainant since he is white and precluded for applying for the job by the plain language of the job requirements contained in the posting.

Respondents argue here though that Complainant cannot prevail in his claim because he neither applied for nor was qualified for the position. However, Complainant

is not required to apply for the position to succeed in the instant case because doing so would have been a futile act since the plain language of the posting invited only minorities to apply. (See, of ***Pime v. Loyola Univ. of Chicago***, 803 F.2d 351, 353 (7th Cir. 1986), which has endorsed the theory that a formal job application need not be made in every failure to hire claim at least under the framework of Title VII if it is clear that the application would be futile.) Furthermore, Respondents' argument that Complainant was not qualified for the job is also not well taken since job posting only required that the applicant hold an Illinois teaching certificate or be eligible for immediate certification. Complainant held an Illinois teaching certificate in 1996 and while he may not have been the most qualified candidate for the job, he met the minimum qualifications. Whether or not Complainant's qualifications were superior to other candidates for the job is an issue reserved for damages, but it is not fatal to his claim of discrimination. See, ***Lalvani and Cook Co. Hosp***.__ Ill. HRC.___ (1990CA2502, Order and Decision, January 30, 1998).

Finally, it should be noted that Taft argued in its closing brief that it was shielded from liability because of the existence of the federal desegregation consent decree which required it to hire minorities within the district. While this may have been true, it did not give Taft free range to only solicit minority job candidates since the decree provided a mechanism to hire non-minority candidates if the hiring of a non-minority would otherwise have thrown the school out of compliance with the desegregation order. Taft simply chose not to submit to this process and instead sought exclusively minority candidates in violation of the Illinois Human Rights Act.

**Aiding and abetting by Respondent NEIU**

The Illinois Human Rights Act also makes it unlawful to aid or abet a person in violating the Act. See, ***775 ILCS 5/6-101(B)***. In the instant case, Complainant alleges that Respondent NEIU aided Respondent Taft in race discrimination by posting a job

intake form seeking only minority candidates for a job with the high school. In order to succeed on a claim for aiding and abetting, once a complainant has established an underlying violation of section 2-102 of the Act, he must also prove that a respondent acted with *scienter*, i.e. knowledge of the violation. See, for example, ***Cook and Bailey***, __ Ill. HRC. Rep.___ at 5 (1991CN0332, February 8, 1993).

NEIU argues that Complainant cannot show the requisite element of *scienter* because: 1) the actions of Becky Kallem, a low-level secretary, cannot be imputed to NEIU; and, 2) Complainant failed to prove Taft discriminated against him on the basis of his race. I have already determined Taft discriminated against Complainant, who is Caucasian, when it sought only minority applicants for a teaching position. Thus the only question is whether NEIU can be liable for the actions of its secretary, Becky Kallem. To this end, NEIU relies on the Seventh Circuit case of ***Doe v. R. R. Donnelly & Sons Co.,*** 42 F3d. 439 (7th Cir. 1994) for the proposition that common law agency principles provide that management cannot "be aware of every impropriety committed by low-level employees." ***Id.*** at 446. While this is true in some cases, it is distinguishable from the case at bar.

In ***R.R. Donnelly & Sons Co.,*** the court was faced with the question of whether, under Title VII of the Civil Rights Act of 1964, an employer could be held liable for sexual harassment of one employee by her co-worker. The Court, applying agency principals, found that in order to extend liability for sexual harassment to an employer for the acts of non-supervisory employees, the employer would have to have actual knowledge of the harassment unless: 1) "the [employee] receives the knowledge while acting within the scope of the [her] authority; and 2) the knowledge concerns a matter within the scope of that authority." Id at 446, citing ***Juarez v. Ameritech Mobile Communications, Inc.,*** 957 F.2d 317, 320 (7th Cir.1992). In the instant case, Kallem's job duties included receiving phone calls from employers and filling out job intake forms with information

received during the call. It was also within her purview to process the intake forms and post the available job openings on the bulletin board for public view. Thus, she was clearly acting within the scope of her authority when she posted a form on the job board containing the discriminatory language and imputing that act to NEIU.

Moreover, the Commission is not bound by federal precedent, rather it is bound by its own body of case law which holds that the appropriate standard to be applied in cases where an admission against the employer is at issue is: "whether the statement concerns matters within the scope of the employee's employment and not on whether the employee had the authority to make the statement." See, ***Hopgood and State Farm Fire and Casualty Co.***, __ Ill. HRC. Rep.__ (1990SF0028, July 15, 1996) What NEIU overlooks here is the fact that taking phone intake requests and filling out job intake forms were part of the job duties which defined Kallem's "low-level" position. It set up a system that allowed a secretary to intake and post open job positions from employers over the phone and those forms were only occasionally spot-checked by the placement director for accuracy. It is now very difficult for NEIU to cry foul when the system fails and to deny knowledge of discriminatory conduct by sticking their proverbial head in the sand.

Finally, it is important to note that I do not believe that NEIU, through Kallem's acts, was motivated by unlawful discrimination in posting a job announcement for Taft High School. However, the lack of discriminatory intent does not shield it from liability. In fact, the Commission has anticipated a situation such as this and stated, for example, that "a newspaper which prints help wanted ads which are discriminatory, in accordance with the wishes of its customers, may be guilty of aiding and abetting a violation of the Human Rights Act, even though the newspaper had no discriminatory animus." ***Cook and Bailey***, __ Ill. HRC. Rep.___ at 5 (1991CN0332, February 8, 1993). That is exactly the case here where NEIU has published, in essence, a discriminatory help-wanted ad

at the request of Taft High School. In a prior ruling in this case I found then, just as I do now, that the very act of posting for public view the job intake form with the wording "need to be minority" satisfies the necessary requirement of *scienter.* Thus, Complainant has successfully established that the Act has been violated and the only remaining issue for discussion is his appropriate damages.

**Complainant's Damages**

In this case Complainant seeks back pay and damages for emotional distress from both Respondents. However, the very nature of the allegations of this claim never triggered an award for back pay. In this case, Complainant was prevented from applying for the posted job at Taft High School because the posting only sought minority candidates. Thus, the appropriate remedy is that Complainant be given the opportunity to apply and participate in a fair application process for the next Introduction to Music position that becomes available.

However, complainant is entitled to damages for emotional distress for his outburst at seeing the discriminatory job posting. This is so because, the Commission has held that credible evidence of embarrassment and humiliation is sufficient to establish an award of emotional distress in employment cases as long as it is clear that back pay and other pecuniary compensation will not make a complainant whole. *See*, In the Matter of: ***Helga Palumbo and Palos Community Hospital***, ___Ill HRC Rep.____ (1996CA0145, January 10, 2000, Recommended order and decision June 17, 1999); *citing*, ***Nichols and Boyd A. Jarrell & Co., Inc.***, 14 Ill. HRC Rep. 149 (1984), and ***Smith and Cook County Sheriff's Office***, 19 Ill. HRC Rep. 131 (1985). Complainant cannot be made whole here since he is not entitled to back pay and cannot be given a fair opportunity to apply for the job in question since it was successfully filled with another qualified candidate. Thus, an award for emotional distress is reasonable.

To that end, Complainant's public, angry outburst after viewing the discriminatory job posting is strong evidence that he was emotionally distressed since he threw magazines on the floor and yelled at employees in the placement office. Though Complainant also seeks emotional distress damages for poor skin conditions, increased anger and stress, he did not present evidence to show that those conditions were inextricably related to viewing the discriminatory job posting at NEIU, or that they were not present before the allegations arose in this case. Finally, Complainant represented himself in this matter so the issue of attorney's fees does not need to be addressed. Thus, Complainant is only entitled to the limited amount of emotional distress damages as discussed above.

## Recommendation

Based on the above findings of fact and conclusions of law I recommend that the Illinois Human Rights Commission sustain the Complaint of Davy Cady against Respondents Northeastern Illinois College and Chicago Board of Education-Taft High School, and further recommend that:

a) Respondent Chicago Board of Education Taft High School notify Complainant as to the next posted Introduction to Music teacher position within the school and accept his application should he choose to apply;

b) Respondents jointly pay Complainant the sum of $2,000 in damages for emotional distress;

c) Respondents jointly pay Complainant prejudgment interest for the sums indicated above in paragraphs (a) to be calculated as provided in ***56 Ill. Admin. Code, §5300.1145***; and,

d) Respondent Chicago Board of Education cease and desist from further discrimination on the basis of race; and

e) Respondent Northeastern Illinois University cease and desist aiding and abetting race discrimination as prohibited by the Illinois Human Rights Act.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Administrative Law Section

ENTERED THE 1ST DAY OF FEBRUARY, 2005.